

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JOSHUA RYAN KOENIG,

Plaintiff,

vs.

NEXUS PROGRAM, DARREN
FISHIER, STEVE, DAVE BOYD,
and LISA LUCKY,

Defendants.

Cause No. CV 09-00100-GF-SEH-RKS

ORDER AND FINDINGS AND
RECOMMENDATIONS OF UNITED STATES
MAGISTRATE JUDGE TO DISMISS
COMPLAINT

Plaintiff Joshua Ryan Koenig, a state prisoner proceeding pro se, filed this civil rights action pursuant to [42 U.S.C. § 1983](#). He alleges Defendants utilized excessive force in violation of the Eighth Amendment to the United States Constitution. The Court has federal question jurisdiction pursuant to [28 U.S.C. § 1331](#).

I. MOTION TO PROCEED IN FORMA PAUPERIS

Plaintiff's declaration and account statements make the showing required by [28 U.S.C. §1915\(a\)](#). Accordingly, his request to proceed in forma pauperis will be granted.

Pursuant to [28 U.S.C. § 1915\(b\)\(1\)](#) Plaintiff must pay the statutory filing fee of \$350.00, even if the case is dismissed. See [28 U.S.C. § 1915\(b\)\(1\), \(e\)\(2\)](#). Because Plaintiff's inmate account currently lacks sufficient funds to satisfy the initial partial filing fee, this requirement is waived. But Plaintiff must make monthly payments of 20% of the income credited to his account each month. The percentage is set by statute and cannot be altered. See [28 U.S.C. § 1915\(b\)\(2\)](#). By separate order, the agency having custody of Plaintiff will be directed to forward payments from Plaintiff's account to the Clerk of Court each time the amount in the account exceeds \$10.00, until the filing fee is paid in full. [28 U.S.C. § 1915\(b\)\(2\)](#).

Plaintiff's Complaint is deemed filed as of the date the Motion to Proceed in Forma Pauperis was filed and the proposed complaint was delivered to the Clerk of Court. See [Loya v. Desert Sands Unified Sch. Dist.](#), 721 F.2d 279, 280-81 (9th Cir. 1983); see also [United States v. Dae Rim Fishery Co.](#), 794 F.2d 1392, 1395 (9th Cir. 1986) (concluding complaint constructively filed when delivered to clerk of court).

II. STATEMENT OF THE CASE

A. Parties

Plaintiff is a prisoner currently incarcerated at the Montana State Prison in Deer Lodge, Montana. His allegations arose during his placement at the Nexus Program in Lewistown, Montana.

The named Defendants are the Nexus Program; Darren Fishier, staff supervisor; Steve, security tech; Dave Boyd, Director; and Lisa Lucky, staff security supervisor.

B. Allegations

Plaintiff alleges on July 24, 2008 his rights under the Eighth Amendment of the United States Constitution were violated when Defendants Fishier and Steve physically “ripped” him out of a shower naked, “slammed him into a wall,” and cuffed him up. (Court's Doc. 7, p. 5).

He contends Lisa Lucky witnessed these actions and did nothing and Dave Boyd “brushed the event under the carpet” and “allows staff members to oversee inmates.” (Court's Doc. 7, p. 5).

III. PRESCREENING

A. Standard

As Plaintiff is a prisoner proceeding in forma pauperis, his Complaint is subject to screening under [28 U.S.C. § 1915](#) and [28 U.S.C. § 1915A](#). [Section 1915A](#) reads in pertinent part as follows:

The court shall review . . . as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity [and] on review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.

[28 U.S.C. § 1915A\(a\) and \(b\)](#); see also [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#)

("Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal-(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.").

[Sections 1915A\(b\) and 1915\(e\)\(2\)\(B\)](#) require for the dismissal of a

complaint before it is served upon the defendants if it is "frivolous" or "fails to state a claim upon which relief may be granted." A complaint is frivolous if it "lacks an arguable basis either in law or in fact."

[Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 1831-32, 104 L.Ed.2d 338 \(1989\).](#) A complaint fails to state a claim upon which relief may be granted if a plaintiff fails to allege the "grounds" of his "entitlement to relief." [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 \(2007\)](#) (quotation omitted).

This requirement demands "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." [Twombly, 550 U.S. 544.](#) A complaint must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" [Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 \(2007\)](#)(quoting [Bell, 127 S.Ct. at 1964](#) (quoting [Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 \(1957\)](#))).

Rule 8(a)(2) requires a complaint to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 \(2009\)](#) (internal

quotation marks omitted). The "plausibility standard" is guided by "[t]wo working principles." [Iqbal, 129 S.Ct. at 1949](#). First, although "a court must accept as true all of the allegations contained in a complaint," that "tenet" "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." [Iqbal, 129 S.Ct. at 1949](#). "Second, only a complaint that states a plausible claim for relief survives" and "[d]etermining whether a complaint states a plausible claim for relief will, . . . , be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." [Iqbal, 129 S.Ct. at 1950](#). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." [Iqbal, 129 S.Ct. at 1949](#) (internal quotation marks and citation omitted).

The court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." [Iqbal, 129 S.Ct. at 1950](#). Legal conclusions must be supported by factual allegations. [Iqbal, 129 S.Ct. at 1950](#). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." [Iqbal, 129 S.Ct. at 1950](#).

Even after *Twombly*, "[a] document filed pro se is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers'." [Erickson, 127 S.Ct. at 2200](#); Cf. [Fed.R.Civ.P. 8\(f\)](#) ("All pleadings shall be so construed as to do substantial justice").

Although the statute requires a dismissal for the reasons stated, it does not deprive the district court of its discretion to grant or deny leave to amend. [Lopez v. Smith, 203 F.3d 1122, 1127 \(9th Cir. 2000\)](#). The court can decline to grant leave to amend if "it determines that the pleading could not possibly be cured by the allegation of other facts." [Lopez, 203 F.3d. at 1127](#) (quoting [Doe v. United States, 58 F.3d 494,](#)

[497 \(9th Cir. 1995\)](#)). Leave to amend is liberally granted to pro se litigants unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." [Noll v. Carlson, 809 F.2d 1446, 1448 \(9th Cir. 1987\)](#) (citing [Broughton v. Cutter Labs., 622 F.2d 458, 460 \(9th Cir. 1980\)](#)).

B. Analysis

Eighth Amendment excessive use of force claims contain both a subjective and an objective component which require two inquiries: (1) whether the official charged with inflicting force acted with a sufficiently culpable state-of-mind; and (2) whether the force used was sufficiently serious to establish a constitutional violation. [Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 \(1992\)](#); [Wilson v. Seiter, 501 U.S. 294, 298 \(1991\)](#). The malicious and sadistic use of force to cause harm always violates contemporary standards of decency, regardless of whether or not significant injury is present. [Hudson, 503 U.S. at 9](#).

"[W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments

Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." [Hudson, 503 U.S. at 7](#). "That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not a sort 'repugnant to the conscience of mankind.'" [Hudson, 503 U.S. at 9-10](#) (internal citations omitted).

Plaintiff alleges he was "physically ripped out of the shower, slammed into a wall, and cuffed up." (Court's Doc. 7, p. 5). This one time occurrence is not even alleged to have caused Plaintiff any physical harm whatsoever. This de minimis use of physical force, assuming the allegations are true, is insufficient as a matter of law to establish a constitutional violation for excessive use of force. By comparison, in *Hudson*, the plaintiff was restrained, cuffed, and then deliberately beaten with resultant bruising and dental injuries. In *Hudson*, malevolence and substantial injury were alleged. Not so here.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's Complaint fails to state a claim upon which relief may be granted and should be dismissed. In light of this recommendation, Plaintiff's Motion for the Appointment of Counsel (Court's Doc. 5) and Motion to Provide Documents (Court's doc. 6) will be denied.

A. "Strike" under [28 U.S.C. § 1915\(g\)](#)

The Prison Litigation Reform Act prohibits prisoners from bringing forma pauperis civil actions if the prisoner has brought three or more actions in federal court that were dismissed for frivolousness, maliciousness, or for failure to state a claim. [28 U.S.C. § 1915\(g\)](#). The Court should designate this case as a "strike" under this provision because Plaintiff fails to state a claim upon which relief may be granted.

B. Certification Regarding Appeal

The Federal Rules of Appellate Procedure provide as follows:

[A] party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a

criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court before or after the notice of appeal is filed certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding;

Fed.R.App.P. 24(a)(3)(A).

Analogously, 28 U.S.C. § 1915(a)(3) provides "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." The good faith standard is an objective one. See Coppedge v. United States, 369 U.S. 438, 445 (1962). A plaintiff satisfies the "good faith" requirement if he or she seeks review of any issue that is "not frivolous." Gardner v. Pogue, 558 F.2d 548, 551 (9th Cir. 1977) (quoting Coppedge, 369 U.S. at 445). For purposes of section 1915, an appeal is frivolous if it lacks any arguable basis in law or fact. Neitzke, 490 U.S. at 325, 327; Franklin v. Murphy, 745 F.2d 1221, 1225 (9th Cir. 1984). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." Walker v. O'Brien, 216 F.3d 626, 631 (9th Cir. 2000).

Plaintiff's failure to state a claim is so clear no reasonable person could suppose an appeal would have merit. Therefore, the Court should certify that any appeal of this matter would not be taken in good faith.

C. Address Changes

At all times during the pendency of this action, Plaintiff SHALL IMMEDIATELY ADVISE the Court of any change of address and its effective date. Such notice shall be captioned "NOTICE OF CHANGE OF ADDRESS." The notice shall contain only information pertaining to the change of address and its effective date, except if Plaintiff has been released from custody, the notice should so indicate. The notice shall not include any motions for any other relief. Failure to file a NOTICE OF CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute pursuant to [Fed.R.Civ.P. 41\(b\)](#).

Based on the foregoing, the Court issues the following:

ORDER

1. Plaintiff's Motion to Proceed in Forma Pauperis (Court's Doc. 1) is GRANTED. The Clerk of Court shall waive prepayment of the filing fee.

2. The Clerk shall edit the text of the docket entry for the Complaint (Court's Doc. 2) to remove the word "LODGED" and the Complaint is DEEMED FILED on October 5, 2009.

3. Plaintiff's Motion for Appointment of Counsel (Court's Doc. 5) is DENIED.

4. Plaintiff's Motion to Provide Documents (Court's Doc. 6) is DENIED.

Further, the Court issues the following:

RECOMMENDATIONS

1. This matter should be DISMISSED WITH PREJUDICE for failure to state a claim upon which relief may be granted.

2. The Clerk of Court should be directed to close this matter and enter judgment pursuant to [Rule 58 of the Federal Rules of Civil Procedure](#).

3. The Clerk of Court should be directed to have the docket reflect that the dismissal counts as a strike pursuant to [28 U.S.C. § 1915\(g\)](#) because Plaintiff failed to state a claim upon which relief may be granted.

4. The Clerk of Court should be directed to have the docket reflect that the Court certifies pursuant to [Fed.R.App.P. 24\(a\)\(3\)\(A\)](#) that any appeal of this decision would not be taken in good faith. The record makes plain the instant Complaint is frivolous as it lacks arguable substance in law or fact.

NOTICE OF RIGHT TO OBJECT TO FINDINGS &
RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), Plaintiff may serve and file written objections to these Findings and Recommendations within ten (10) business days of the date entered as indicated on the Notice of Electronic Filing. Any such filing should be captioned "Objections to Magistrate Judge's Findings and Recommendations."

A district judge will make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge and may waive the right to appeal the District Court's order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

This order is not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to [Fed.R.App.P. 4\(a\)\(1\)](#), should not be filed until entry of the District Court's final judgment.

DATED this 20th day of November, 2009.

/s/ Keith Strong
Keith Strong
United States Magistrate Judge